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SENATE

{ REPORT
No. 138 }

JAMES M. SHELLENBERGER, JR.

FEBRUARY 26 (legislative day, JANUARY 29), 1951.—Ordered to be printed

Mr. JENNER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 699]

The Committee on the Judiciary, to which was referred the bill (S. 699) for the relief of James Shellenberger, Junior, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

AMENDMENTS

On page 1, line 3, strike out down to and including all of line 3 on page 2 and insert in lieu thereof the following:

That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the legal guardian of James M. Shellenberger, Junior, a minor, of Mishawaka, Indiana, the sum of \$50,000, in full settlement of all claims against the United States for the injury of said James M. Shellenberger, Junior, which resulted in the permanent loss of sight in his left eye, the partial loss of sight in his right eye, and facial disfigurement, caused by the use of an improper solution of silver nitrate in the eyes of said infant at the time of his birth in the Sixty-first Station Hospital, United States Army, at Leghorn, Italy, on January 8, 1947: *Provided*, That no part of the amount appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding \$1,000.

Amend the title so as to read: "A bill for the relief of James M. Shellenberger, Junior, a minor."

HISTORY OF THIS BILL

A similar bill (S. 3513) was introduced in the Eighty-first Congress. It was referred to this committee, was reported favorably to the

Senate on December 11, 1950, and passed the Senate on December 15, 1950. By reason of the last minute rush it failed to pass the House.

PURPOSE

The purpose of the proposed bill, as amended, is to pay to the legal guardian of James M. Shellenberger, Jr., a minor, the sum of \$50,000 in full settlement of all claims against the United States for the injuries of the said James M. Shellenberger, Jr., which resulted in the permanent loss of sight of his left eye and partial loss of sight of his right eye and facial disfigurement caused by the use of an improper solution of silver nitrate in his eyes at the time of his birth in the Sixty-first Station Hospital, United States Army, at Leghorn, Italy, on January 8, 1947.

STATEMENT

James M. Shellenberger, Jr., was born in the United States Army Sixty-first Station Hospital at Leghorn, Italy, on January 8, 1947. His father was a captain in the United States Army stationed at Leghorn, Italy, and his mother was residing with his father there. Mrs. Shellenberger was attended at the birth of the child by First Lt. John W. Bertrand. Immediately after the birth of the child its eyes were severely injured by a solution labeled "1 percent silver nitrate," one drop of which was instilled in each eye by the attending medical officer. As the result of the instillation of said solution in the eyes of this infant, he has been left with no vision in the left eye and only about 50 percent vision in the right eye.

The solution which was instilled in the eyes of the infant was not 1 percent silver nitrate, as the label on the bottle indicated. It appears that the solution used was much stronger than 1 percent silver nitrate.

The facts are not clear as to exactly how the error occurred or who is responsible for the error. The medical officer states that during the early part of the delivery of the child, he heard the nurse ask for some 1 percent silver nitrate. As there was none in the delivery room, the nurse asked one of the male personnel present to go and get some in the pharmacy. The solution which was used in the eyes of this infant apparently was prepared by a private who was not a registered pharmacist.

The purpose of this bill is not to fix the blame on any particular individual for this unfortunate accident. The fact is inescapable that neither the child nor the parents were or could be in anywise responsible for the mistake. The mistake was the mistake of the Army.

The report from the Secretary of the Army admits that the fault was the fault of the Army but feels that an award of \$20,000 would constitute a fair and reasonable settlement but that an award of \$50,000 "appears to be somewhat excessive."

The report from the Department of Justice concurs in the views of the Army as to the amount that should be awarded for these injuries. There are no arbitrary standards by which the value of the eyes of a new-born infant can be gaged. The cash value cannot be placed on the eyes of an individual who is forced to go through life impeded and handicapped by this injury. The committee have reached the conclusion that \$50,000 is not an excessive amount to allow for this injury. Accordingly, the bill is favorably reported for said sum.

Attached hereto and made a part of this report are the following two letters, each concerning S. 3513, Eighty-first Congress: One of July 14, 1950, to the Department of Justice from the Secretary of the Army; and one of September 12, 1950, to the chairman of the Senate Judiciary Committee, Hon. Pat McCarran, from the Department of Justice:

DEPARTMENT OF THE ARMY,
July 14, 1950.

The honorable the ATTORNEY GENERAL,
Washington, D. C.

DEAR MR. ATTORNEY GENERAL: Reference is made to your letter with which you enclosed a copy of S. 3510, Eighty-first Congress, a bill for the relief of James Shellenberger, Jr. You state that the Senate Committee on the Judiciary has requested the Department of Justice to submit a report on this bill and has advised that if reports are necessary from other sources they will be secured by your Department and submitted along with your report to the committee. You, therefore, request the comments of the Department of the Army on S. 3513.

This bill provides as follows:

"That the Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to James Shellenberger, Senior, of 3835 Lincolnway East, Mishawaka, Indiana, on behalf of his infant son, James Shellenberger, Junior, the sum of \$50,000, in full satisfaction of the claim of the said James Shellenberger, Junior, against the United States for compensation for permanent and complete loss of sight in one eye, partial loss of sight in the other eye, and facial disfigurement, caused by the use of an improper solution of silver nitrate in his eyes at the time of his birth in the United States Army 61 Station Hospital in Leghorn, Italy, in January 1947."

The records of the Department of the Army show that in January 1947 Capt. James M. Shellenberger, United States Army, was stationed at the Sixty-first Quartermaster Base Depot, Leghorn, Italy, and that his wife was residing with him in Leghorn. On January 8, 1947, at about 6 p. m., an infant son was born to Mrs. Shellenberger at the Sixty-first Station Hospital, United States Army, in Leghorn. The infant, who was subsequently named James M. Shellenberger, Jr., was delivered by First Lt. John W. Bertrand, Medical Corps, United States Army. It appears that immediately after the birth of this child its eyes were severely injured by a solution labeled "1 percent silver nitrate," one drop of which was instilled in each eye by the attending medical officer. As the result of the instillation of said solution in the eyes of this infant he has been left with no vision in the left eye and only about 50 percent vision in the right eye.

On January 20, 1947, Lieutenant Bertrand executed an affidavit in which he stated:

"During the early part of the delivery I heard the nurse ask for some 1 percent silver nitrate. There was none in the delivery room, and I heard the nurse ask one of the male operating-room personnel to go and get some at the pharmacy. After the baby was resuscitated I instilled one drop of the solution from the new bottle labeled "1 percent silver nitrate" in each eye with a sterile medicine dropper and I flushed it with a solution taken from a liter flask labeled "normal saline" using a separate sterile medicine dropper. After the silver nitrate was instilled I saw a slight whitish precipitate form in the eyes; I have seen this before and consider it a normal reaction. I first noticed the edema of the eyelids the morning after delivery (Thursday, January 9, 1947) and advised use of compresses and boric acid irrigations. Later on Thursday, January 9, 1947, the eyes became more edematous and a discharge appeared. Friday morning, January 10, 1947, the eyes looked very bad and I called Lieutenant Nickeson in on consultation."

On January 20, 1947, First Lt. Robert W. Nickeson, Medical Corps, United States Army, who was then chief of the Eye, Ear, Nose and Throat Section, Sixty-first Station Hospital, executed the following sworn statement:

"1. I first saw Baby Shellenberger on January 10, 1947, in the morning. The baby was born around 1800 hours (6 p. m.) on Wednesday, January 8, 1947. When I saw him, both eyes were greatly swollen and difficult to examine. There was profuse mucoid discharge which did not look like a purulent exudate. The tarsal conjunctiva in the left eye was covered by a thick white plaque; the conjunctiva of the left lower lid and both lids of the right eye were edematous and red. The corneas could not be seen for about 2 days. Frequent irrigations of both eyes with copious amounts of boric acid solution were ordered, and I performed the irrigations myself many times. About January 12, 1947, the swelling had receded

enough to allow an examination of the corneas; the cornea of the left eye was white and opaque, while that of the right eye appeared to be almost normal. In the next few days the condition remained relatively unchanged except for a slight clouding of the right cornea. In the right eye the iris and pupil can be hastily seen, and I feel certain that the baby perceives light with that eye. I do not think the left eye perceives light.

"2. I recommend immediate evacuation to the ZI (zone of the interior, United States) to allow the parents opportunity for the best ophthalmological consultation available.

"3. Diagnosis: Corneal opacity, bilateral, caused by instillation of chemical caustic at birth, January 8, 1947."

It appears that the aforesaid solution labeled "1 percent silver nitrate," which was instilled in the eyes of the infant son of Captain Shellenberger, was prepared by Pvt. Oshur R. Hurvitz, an Army pharmacist, who was not a registered pharmacist, and who had not been advised prior to the preparation of the solution of the purpose for which it was to be used.

In an affidavit executed January 20, 1947, Private Hurvitz stated:

"January 8, 1947, called from quarters by operating room. Came to the pharmacy and prepared, according to a prescription brought to the pharmacy by an Italian worker, a 1 percent solution of silver nitrate. The solution was prepared with tap water, and the silver nitrate crystals were weighed out on an analytical balance weighing in tenths of grams. I took it to the operating room and gave it to a nurse, not knowing what it was to be used for. I returned to the pharmacy. A few minutes later I began wondering whether the solution was intended for external use or ophthalmic purposes, and I went back to the operating room. I asked the nurse what they used the 1 percent silver nitrate for, and when she told me that it was used in babies' eyes I asked for the bottle I had just prepared. I brought the bottle back to the pharmacy, poured it out and poured out also the 30 cubic centimeters remaining from the original prescription, of which I had made 60 cubic centimeters. I then prepared 60 cubic centimeters more of 1 percent silver nitrate in distilled water, and took it back to the operating room. The reason I wanted to prepare the solution in distilled water is that it is considered to be purer than when prepared with tap water."

A board of officers, consisting of four Army medical officers, was appointed to investigate the incident resulting in the injury of the eyes of the infant son of Captain and Mrs. Shellenberger. On January 18, 1947, the board submitted a report, which reads, in pertinent part, as follows:

"1. Pursuant to the requirements of Special Order No. 9, Headquarters Sixty-first Station Hospital, * * * a board of officers met at the Sixty-first Station Hospital and investigated the incident causing the severe injuries to the eyes of Baby Shellenberger, dependent of Capt. J. M. Shellenberger, O724855, Sixty-first Quartermaster Base Depot.

"2. The board met at the station hospital on January 18, and after carefully questioning all witnesses came to the following conclusions:

"(a) The injuries to Baby Shellenberger's eyes were due to the instillation of some chemical irritant at birth.

"(b) The chemical irritant was labeled and believed to be at the time a 1-percent silver nitrate solution.

"(c) The testimony of Pvt. Oshur R. Hurvitz, who was on duty at the hospital pharmacy, tends to give reason that the solution in all probability was stronger than the labeled '1-percent silver nitrate solution.'

"(d) The practice of using 1 percent silver nitrate for the Crede prophylaxis against ophthalmia neonatorum is dangerous because of possible chances of making errors and preparing stronger solutions.

"3. Recommendations:

"(a) The board recommends that Pvt. Oshur R. Hurvitz be removed from the pharmacy and be replaced by a well-trained registered pharmacist, if one is available.

"(b) That the use of silver nitrate for the Crede prophylaxis against ophthalmia neonatorum be abandoned, and that it be replaced by a solution of penicillin, 2,000 units per cubic centimeter.

"(c) The board further recommends immediate evacuation of the child to the United States."

On May 22, 1950, Dr. J. W. Cassady, 527 Sherland Building, South Bend, Ind., a specialist in the diseases of the eye, submitted the following statement concerning the infant, James M. Shellenberger, Jr.:

"Relative to James Shellenberger, Jr., 3835 Lincoln Way East, Mishawaka, Ind. The Shellenger youngster was first brought to me when he was 6 months

old in June of 1947. At that time the right eye showed evidence of chemical burn and perforation of the eyeball with a scar on the inner lower portion of the right cornea. The pupil was dislocated nasally and incarcerated in the scar of the perforation.

"The left eye was pthysical and with an opaque vascularized cornea with a staphyloma of the cornea. There was no vision in the left eye and the right eye had about, I would estimate, probably 50-percent vision. I sent them to Dr. Kronfeld, in Chicago, in March of 1948, who advised that no enucleation of the eye be done until the child was 8 to 12 years of age because of the interference with the development of the orbit.

"In November of 1948 the left eye had gotten so large that an operation was done in order to cover the thin scar of the center of the cornea. This was done at Memorial Hospital. Since then, from time to time, the left eye has become red and inflamed for several days and it seems to be getting larger. It is necessary for the child to wear a shell over the thin left eye in order to protect it.

"The right eye has a very high myopic astigmatism as a result of the scar and distortion. The charges that I made since 1947 for these people have been \$112 which includes the operation on the eye. In addition to this there has been the charge for consultation with Dr. Kronfeld which probably amounted to \$25.

"The proposed future treatment of this patient will involve fitting him with glasses due to the high nearsighted astigmatism, X-rays, and later, removal of the left eyeball as well as possible subsequent operations in order to clear up scar tissue that would be in the eye socket. I would estimate that 50-percent vision in the right eye would be a very conservative estimate at the best, although at his age measurement of vision is difficult.

"It will always be necessary for him to have special tutoring or to be in sight-saving class and he will have a very difficult time in competing with other people with this reduced vision of only one eye. The other eye will have a disfigurement of the artificial eye which can never be compensated for."

It appears that all of the medical treatment of this infant, except that rendered by private physicians at a total cost of \$137, was furnished by the Medical Corps of the Army without charge.

The evidence in this case fairly establishes that the injury of the infant, James M. Shellenberger, Jr., was caused by the instillation in his eyes of a solution which was improperly prepared and much stronger than the label on the bottle indicated. The legal guardian of James M. Shellenberger, Jr., has no remedy under the Federal Tort Claims Act (60 Stat. 843; 28 U. S. C. 931), as revised and codified by the act of June 25, 1948 (62 Stat. 933; 28 U. S. C. 1346 (b)), and as amended by the act of April 25, 1949 (Public Law 55, 81st Cong.), for the reason that said statute specifically provides that the provisions thereof "shall not apply to * * * Any claim arising in a foreign country." (28 U. S. C. 2680 (k)).

Under the facts and circumstances in this case it seems clear that, if this incident had occurred within the United States the legal guardian of this child could recover damages from the United States on account of the injury of said child, under the Federal Tort Claims Act, as amended. (*Wilscom v. United States*, 78 F. Supp. 581 (U. S. District Court for the District of Hawaii, decided on March 24, 1948); *Costley v. United States*, Case No. 13015 (U. S. Circuit Court of Appeals for the Fifth Circuit, decided on May 5, 1950)).

In view of the serious and grievous injury of this child, which was caused by the negligence of responsible military personnel, and which has resulted in the total loss of vision in his left eye and the loss of approximately 50 percent of the vision in his right eye, as well as facial disfigurement, and the handicaps to which he will be subjected because of his disability, it is the view of the Department of the Army that adequate compensation should be awarded for his benefit. The proposed award of \$50,000 provided in S. 3513 appears to be somewhat excessive. After a careful consideration of all of the facts and circumstances in this case, it is believed that an award for the benefit of James M. Shellenberger, Jr., in the amount of \$20,000 would constitute a fair and reasonable settlement on account of his injuries and the disability and disfigurement resulting therefrom. The Department of the Army, therefore, would have no objection to an award for the benefit of this child in that amount. Furthermore, the Department would have no objection to an award to Capt. James M. Shellenberger, Sr., in the amount of \$137 in reimbursement for the private medical expenses incurred by him for the treatment of his infant son.

It is, therefore, recommended that the title and text of this bill be amended to read as follows:

"A BILL For the relief of James M. Shellenberger, Junior, a minor, and James M. Shellenberger, Senior

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the legal guardian of James M. Shellenberger, Junior, a minor, of Mishawaka, Indiana, the sum of \$20,000, in full settlement of all claims against the United States for the injury of said James M. Shellenberger, Junior, which resulted in the permanent loss of sight in his left eye, the partial loss of sight in his right eye, and facial disfigurement, caused by the use of an improper solution of silver nitrate in the eyes of said infant at the time of his birth in the 61st Station Hospital, United States Army, at Leghorn, Italy, on January 8, 1947; and to pay to James M. Shellenberger, Senior, the sum of \$137, in full settlement of all claims against the United States for medical and hospital expenses incurred by him in the treatment of the said James M. Shellenberger, Junior: *Provided,* That no part of the amounts appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or agents, or attorney or attorneys, on account of services rendered in connection with these claims, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding \$1,000."

Sincerely yours,

FRANK PACE, Jr., *Secretary of the Army.*

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, September 12, 1950.

HON. PAT MCCARRAN,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

MY DEAR SENATOR: This is in response to your request for the views of the Department of Justice relative to the bill (S. 3513) for the relief of James Shellenberger, Jr.

The bill would provide for payment of the sum of \$50,000 to James Shellenberger, Sr., of Mishawaka, Ind., on behalf of his infant son, James Shellenberger, Jr., in full satisfaction of his son's claim against the United States for compensation for permanent and complete loss of sight in one eye, partial loss of sight in the other eye, and facial disfigurement caused by the use of an improper solution of silver nitrate in his eyes in the United States Army Station Hospital in Leghorn, Italy, in January 1947.

In compliance with your request, a report was obtained from the Department of the Army concerning this legislation. According to that report, which is enclosed, it appears that in January 1947, Capt. James M. Shellenberger was stationed at the Sixty-first Quartermaster Base Depot, Leghorn, Italy. On January 8, 1947, an infant son was born to Mrs. Shellenberger at the station hospital at the depot. Immediately after delivery of the child, its eyes were severely injured by a solution labeled "1 percent silver nitrate," one drop of which was instilled in each eye by the attending medical officer. As a result of such instillation, the infant has been left with no vision in his left eye and only about 50 percent vision in the right eye.

On January 18, 1947, a board of officers, which had been appointed to investigate the incident found, among other things, that the injuries to the infant's eyes were due to the instillation of some chemical irritant at birth, and that the chemical irritant, labeled and believed to be at the time a 1-percent silver nitrate solution, in all probability was stronger than the labeled 1-percent silver nitrate solution. The Army report further states that a specialist in diseases of the eye, of South Bend, Ind., consulted by the infant's parents, is of the opinion that ultimate removal of the left eyeball and other operations will be necessary and that 50 percent vision in the right eye will probably remain, as a conservative estimate. In his opinion, it will always be necessary for the infant to have special tutoring or to be in sight-saving classes, or he will have a very difficult time in competing with other people, with the reduced vision of only one eye. The other eye will have the disfigurement of an artificial eye.

Since the incident, which is the basis of this claim, arose in a foreign country, it is not a claim which comes within the purview of the Federal Tort Claims Act (28 U. S. C., sec. 2680 (k)). The Department of the Army indicates that it believes the proposed award of \$50,000, provided in the bill, to be somewhat excessive, and suggests that the amount to be paid be reduced to the sum of \$20,000. The Department of the Army states, therefore, that it would have no objection to an award for the benefit of this child in that amount. It also states that it would have no objection to an award to the child's father in the amount of \$137 in reimbursement for the private medical expenses incurred by him for the treatment of his infant son. The Department of the Army recommends that the title and text of the bill be amended in accordance with the suggested bill set out on page 6 of its report.

The Department of Justice concurs in the views of the Department of the Army.

The Director of the Bureau of the Budget has advised this office that there would be no objection to the submission of this report.

Yours sincerely,

PEXTON FORD,
Deputy Attorney General.

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